91-1535

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,
Petitioner,
vs.
CITY OF RALEIGH, NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an ordinance regulating land use be "ripe" for judicial review immediately upon enactment (as the courts below held) when the ordinance makes no immediate change in the way in which the property may be used and its actual impact will not be felt until 5 1/2 years in the future?

2. Can an "as applied" challenge to an ordinance regulating land use be made (as the courts below held) *before* the ordinance has been applied in a concrete way which causes actual damage?

3. Can unconstitutional conduct be shielded from judicial review by a statute of limitations? If so, can it be (as the Court of Appeals held below) that violation of one provision of the Bill of Rights (the First Amendment) can never be validated by the passage of time, while violation of another (the Taking Clause of the Fifth Amendment) becomes immunized if not immediately challenged?

4. Is the statute of limitations to seek redress directly under the Constitution for violation of the Fifth Amendment's Taking Clause the same as the time to seek redress under 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING

The parties are listed in the caption.

RULE 29.1 STATEMENT

National Advertising Company is a wholly owned subsidiary of Minnesota Mining and Manufacturing Corporation.

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In The
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NATIONAL ADVERTISING COMPANY,
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vs.
CITY OF RALEIGH, NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner National Advertising Company (National) respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Court of Appeals issued its opinion on Oct. 25, 1991, and published it as *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991). (App. A) Petitioner's timely Petition for Rehearing and Suggestion of the Appropriateness of Rehearing in Banc was denied Dec. 31, 1991. (App. B) The District Court's order granting summary judgment and the ensuing judgment are unpublished. (App. C)

JURISDICTION

This case involves an ordinance establishing a regulatory taking of outdoor advertising structures without any pretense of compensation (by the expedient of delaying the time of taking and calling that delay an "amortization" period before the taking occurs).

The Raleigh, North Carolina ordinance in question (App. D), adopted in October 1983, required billboards to be reduced to such a size that they would be useless. In other words, the "size reduction" was equivalent to an outright ban. But the ban was not immediately in effect. **Nothing** was required to be done to any of National's billboards until April 1989 — 5 1/2 years later.[1]

In early 1989, Raleigh informed National that all 36 of its signs in the city would have to be removed by April 1989. At that point, when the dispute between Raleigh and National had become concrete and National was directly threatened with injury, National filed suit to have the ordinance declared unconstitutional as applied to National's billboards.

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[1] Although the summary judgment on timeliness prevented litigation of the merits of the lawsuit, evidence in opposition to the motion for summary judgment showed that forced removal of National's billboards would deprive National of economically viable use of its property. The billboards cannot be relocated economically. The leaseholds on which the structures are located have no use other than as billboard locations. Each billboard has a substantial remaining useful life, is providing income to National, and has a substantial fair market value. National expected to continue using its billboards for the remainder of the billboards' useful lives. As a result, enforcement of the ordinance interferes with National's reasonable, investment-backed, profit expectations.

Raleigh has never offered to compensate National for the taking of its billboards.

National sought the assistance of the District Court (pursuant to 28 U.S.C. §§1331, 1343) because of the unconstitutionality of this action, which took its property without just compensation (in violation of the Fifth and Fourteenth Amendments) and interfered with protected speech (in violation of the First Amendment), and because of the inability of state law to provide relief.

However, the District Court never reached the substantive issues, *granting summary judgment on the ground that the statute of limitations began to run the moment the ordinance was enacted.* The District Court granted summary judgment to the City on the theory that suit ought to have been filed within 3 years of *adoption* of the 1983 ordinance, even though no injury was threatened to National until 1989 — 5 1/2 years after the ordinance's adoption. The District Court's summary judgment in favor of the City was entered April 27, 1990. (App. C)

The Court of Appeals' judgment affirming the District Court was filed October 25, 1991. (App. A) The timely Petition for Rehearing was denied Dec. 31, 1991. (App. B)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

The Raleigh ordinance is reproduced in App. D.

STATEMENT OF THE CASE

National owns 36 advertising billboards within Raleigh's zoning jurisdiction.[2] Each billboard was lawfully erected, had permits under then-existing zoning and building regulations, and has been in place for more than 10 years.

National leases land, builds and maintains outdoor advertising signs on the leased land, and then leases those signs to others for display advertising. National's billboards are used by local and national businesses, as well as non-commercial advertisers such as the Red Cross, the March of Dimes, the League of Women Voters, and various government agencies.

In October 1983, Raleigh adopted an ordinance banning off-premise billboards in most of the City. (App. D) On its face, the ordinance provided that no billboard would have to be dismantled until April 1989.

Nothing happened between the adoption of the ordinance in October 1983 and January 1989. On January 6, 1989, the City sent a letter to National demanding that all 36 of National's billboards, including the 16 on federal aid primary highways, be removed by

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[2] 16 of National's billboards are located on federal aid primary highways. This is important, because Federal law conditions the elimination of billboards on federal aid primary highways on the payment of just compensation. (23 U.S.C. §131)

April 23, 1989. This suit challenging the constitutionality of Raleigh's attempt to enforce the ordinance was filed April 28, 1989.

It was not until December 1989 — nearly a year after its demand for removal of *all* 36 of National's signs — that Raleigh said it would require removal only of the 20 signs not located on federal aid primary highways. This was the first time the city told National of any change in its enforcement plan.

Raleigh's change in enforcement plans during 1989 shows that, as of at least early 1989 — more than 5 years after the ordinance was adopted — even the city was unsure how application of the ordinance would affect National.

On April 23, 1989, the date on which the ordinance required removal of billboards, Raleigh enacted a penalty ordinance, imposing major fines for violation of the billboard ordinance. In deposition, Raleigh's zoning inspector supervisor testified that there was no specific penalty for violating the ordinance before April 23, 1989. Additionally, the city official in charge of enforcing the ordinance testified that Raleigh's January 1989 letter to National was the first step toward enforcement of the ordinance, and that the letter was the first effort even to inform National of which billboards Raleigh required to be removed.

Because this is, in part, a civil rights action under 42 U.S.C. §1983, the limitation period was held to be North Carolina's 3 year statutory period.[3]

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[3] The Court of Appeals concluded that the District Court had used the wrong state statute, but the correct time period was the same. (App. A, p. 4)

The parties disagreed on the date from which the 3 years began to run. Raleigh wanted to avoid litigation of the merits of its action by beginning the running of the statute on the 1983 effective date of the ordinance. National believed that the statute of limitations did not begin until the ordinance was applied to National in 1989, thus "ripening" the dispute for litigation.

The District Court held that the 3-year statute of limitations began to run immediately after enactment of the ordinance. (App. C, p. 7)

The Court of Appeals agreed, but only in part. Accepting the District Court's conclusion that the **Fifth** Amendment takings claim was barred by the passage of time (App. A, p. 13), the Court of Appeals held that the **First** Amendment claim *could not* be time-barred because the passage of time could not legitimize that constitutional violation. (App. A, p. 16) When the internal contradiction in these holdings was called to the Court of Appeals' attention, that Court refused to grant a rehearing to eliminate the confused holding.

After the Court of Appeals filed its opinion, the 9th Circuit Court of Appeals filed its opinion in *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), which held that the statute of limitations for a takings claim brought directly under the Fifth Amendment was different from that applied to actions under 42 U.S.C. §1983. The court below refused to grant rehearing to consider this new development, thus deliberately creating a conflict with the 9th Circuit.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The "ripeness" doctrine in regulatory taking cases has generally been used by government agencies to argue, and courts to hold, that a property owner's suit is premature and filed *too soon*. Thus, as a rule, the property owner is the one urging that his or her dispute with government is sufficiently concrete that litigation may take place.[4]

This case presents the other side of the coin. Here, the property owner did what this Court has, for years, told property owners they must do: wait until concrete injury is done. The result? The courts below held that the complaint was filed *too late*. Contrary to all known authority, the courts below held that sufficient concrete injury was done *by the mere adoption of the ordinance* that suit had to be filed immediately.

The confusion in what it takes to "ripen" a land use controversy for decision merits this Court's attention. Clarification by this Court could eliminate much needless litigation and restrict litigation to the merits, rather than needless procedural gavottes which swell the reports with decisions adding perplexing embroidery to the law of "ripeness" and limitations.

During the last decade, this Court has clearly held that it is necessary to determine with substantial precision the actual, concrete harm suffered by a property owner before there is a controversy "ripe" for adjudication. (*MacDonald, Sommer & Frates v. County of Yolo*, 477

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[4] Illustrative is the situation in the Petition for Writ of Certiorari now pending in *Long Beach Equities, Inc. v. County of Ventura*, no. 91-1076.

U.S. 340, 348 [1986]; *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 190-191 [1985].) Indeed, commentators have expressed the view that this Court appears deliberately to have made it difficult to "ripen" a regulatory taking case, to make certain that a concrete dispute about the actual application of a regulation is presented to the courts. (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49 [July-Aug. 1988]; Mandelker, Gerard & Sullivan, *Federal Land Use Law*, §4A.02 [1986, supp. 1990].)

However, notwithstanding this Court's repeated holdings that regulatory challenges must await specific application and harm to specific property (*Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988]), the courts below held that a land use regulation was *ripe for challenge immediately upon adoption*.

Petitioner believes the decisions below are so clearly contrary to the decisions of this Court cited above that summary reversal would be appropriate. (*Compare, e.g., Mason v. City of Biloxi*, 385 U.S. 370 [1966]; *Johnson v. Virginia*, 373 U.S. 61 [1963].) If not, then certiorari is warranted by the potential havoc to be wreaked in garden variety zoning cases by the holding below that suit **must** be filed immediately upon passage of the ordinance, on pain of being barred from later litigation.[5]

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[5] Even were this problem limited to billboard amortization ordinances, the rapidly proliferating number of such ordinances would warrant certiorari to ensure certainty in the applicable rules.

I.

THERE IS HOPELESS CONFUSION THROUGHOUT THE COUNTRY ON WHAT IT TAKES TO "RIPEN" A REGULATORY TAKING CASE FOR LITIGATION ON THE MERITS

"Ripeness" in land use litigation does not seem to be a concept whose full ramifications have been cohesively considered by this Court. Rather, in the course of not deciding the compensation issue in cases which preceded *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) during the 1980s, this Court concluded that the facts of the cases before it were, for one reason or another, not sufficiently well-developed to form the basis for answering the constitutional question.

Two commentators recently surveyed the land use field and concluded that there is little rhyme or reason to the application of this Court's "ripeness" decisions by lower federal courts. Not only did they find differences from one court to another, they found inconsistent results even within the single Court of Appeals which has treated the issue most often. That sort of confusing result cries out for this Court's intervention:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the Ninth Circuit has had the most

> opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report 49, 53 [July-Aug. 1988]; emphasis added.)

The reality of the confusion spawned by the ripeness "rules" is that the odds overwhelmingly favor the government. As one government lawyer candidly expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 The Urban Lawyer 389, 400 fn. 71 [1988]) The playing field needs to be levelled in order to satisfy the Fifth Amendment protection guaranteed property owners.

A. This Case Further Muddies the "Ripeness" Waters by Holding that Damage Occurs *Upon Enactment* of a Land Use Regulation

This Court has repeatedly sought to restrict the types of municipal actions which will give rise to constitutional taking claims. Thus, the Court has held that mere diminution in market value will not establish a taking. (*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 [1978]) The Court has also held that ". . . even substantial reduction of the attractiveness of the property to potential purchasers . . ." will not establish a taking. (*Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 15 [1984])

The opinion below proceeds in utter defiance of these two clear holdings of this Court by making these two indicia, *i.e.*, a presumed diminution in market value and a presumed reduction in the attractiveness of the property to a potential purchaser, the focus of its analysis. (App. A, p. 8)

Moreover, while conceding that it has been unable to devise any formula for determining when a taking occurs, and concluding that each case must be decided on an "ad hoc" examination of its own facts (*e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 [1979]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 [1984]), this Court has also said that, before a taking can be found, the governmental action *must* have deprived the owner of *all economically viable use* of the property (*e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 [1987]).

The Court of Appeals' damage analysis clearly does not posit an immediate deprivation of all economically viable use. (App. A, p. 8) In sharp conflict, the opinion is premised on the thought that, on the day the ordinance was enacted, an appraiser could have viewed the situation and proclaimed that some lesser injury had been done to National. (App. A, p. 8)

The Court of Appeals' analysis is contrary to numerous cases from this Court and other Courts of Appeals which uniformly forbid that sort of speculative "valuation."

As long ago as *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), this Court refused to accept allegations of value loss by property owners resulting from the mere enactment of a zoning ordinance restricting the use of

the plaintiffs' land, relegating them to a later challenge, as applied, when the ordinance actually caused damage.

In *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980), the property owners asserted that a rezoning of their land completely destroyed its value. This Court, of course, held that claim to be premature.

In *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), the property owners urged that a new general plan had left them with no economically viable uses. The case was held unripe.

The point is that, from the property owner's perspective, it is not difficult to visualize substantial adverse economic impact upon the adoption of new regulations. In many cases, competent professional appraisers would willingly testify that the "market" immediately reacts to such events. Nonetheless, the nearly uniform judicial reaction to date has been to refuse to evaluate such claims. This Court and most lower courts have concluded that such evaluation must await actual application and concrete injury.

The opinion below conflicts with that settled methodology. Thus, to determine the economic impact on National's property on the day Raleigh adopted its ordinance, an appraiser would have been required to make numerous determinations about what National's business structure would look like 5 1/2 years in the future.[6] Among other things, the hypothetical appraiser would have to decide at least the following: (1) whether National would still be in the outdoor advertising business 5 1/2 years in the future; (2) the scope of National's

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[6] If someone could make such predictions, one might legitimately inquire why he was working as an appraiser instead of investing in the stock market, or more particularly, in the "futures" market, where such talent could be put to far more lucrative use.

business 5 1/2 years hence; (3) the type of contracts National would use in 5 1/2 years; (4) the market for outdoor advertising in 5 1/2 years — in Raleigh and elsewhere; (5) the potential uses for the land on which National's signs are located in 5 1/2 years; and (6) the salvage value of signs in 5 1/2 years (a computation which would have to include further speculation on the nature of the rest of National's business to be able to know what use National would then be able to make of the signs being dismantled and removed from Raleigh). Additionally, the appraiser would have to be able to predict whether the city would change its corporate mind because of the following: (7) change in the composition of the city council; (8) change in the economy producing a need (or, at least, a municipal desire) for a different result; and (9) a determination of whether to exempt the federal aid highway signs. The latter actually occurred here. In early 1989, Raleigh demanded removal of *all* of National's signs. At the end of 1989, however, the city changed its mind and excluded the federal aid highway signs from its demand.

The nature of these inquiries demonstrates the wisdom of the long line of cases holding that challenges to municipal ordinances as takings are not ripe until the damage *actually occurs*. (*E.g., Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 293-297 [1981]; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 494-495 [1987]; *Pennell v. City of San Jose*, 485 U.S. 1, 10 [1988])

Evaluation *after* the "amortization" period ends, when it can be said with certainty *that* the signs will have to be dismantled and *which* signs will have to be dismantled, is relatively easy. It is the kind of task appraisers do routinely. It requires no speculation. By contrast, the

methodology mandated by the opinion below is rife with guesswork and hypothesizing.

B. This Case Creates an Impossible Hurdle by Holding that Suit Must be Filed Even BEFORE a Cause of Action Exists

A key inquiry in a regulatory taking case is determining when in the relationship between government and property owner the impact on the property owner became so severe that it became a taking and a cause of action thus accrued. Current case law teaches that regulatory taking cases are not treated like rear end collision cases in determining the accrual of the cause of action. Unlike a collision case, there is no precise *punctum temporis* in the history of the property owner's relationship with the regulators at which the cause of action automatically arises. Rather, as this Court put it, a court faced with a taking case is required to:

> ". . . resolve the difficult problem of how to define 'too far,' that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." (*Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 199 [1985])

By definition, statutes of limitations are tied to causes of action; they do not exist in a vacuum. A statute of limitations does not begin to run until a cause of action accrues. As the most general of texts puts it:

> ". . . time begins to run under such statutes [of limitations] when, and only when, the cause or right of action has accrued or arisen. . . . [T]he statute of limitations begins to run immediately upon the accrual of the cause of action." (51 *Am.Jur.2d*, Limitation of Actions §107 at 679)

Thus, to conclude that the statute of limitations ran at bench, it was incumbent on the courts below to determine when a cause of action for a Fifth Amendment taking accrued in favor of National Advertising. But the opinion below repeatedly acknowledges that it does not decide whether a taking occurred when Raleigh enacted its ordinance. (App. A, pp. 6, fn. 3, 8)[7] And then the opinion goes on to conclude that the statute of limitations has already run. The problem with that analysis is that the point in the process at which the regulatory impact became so severe that a taking occurred must be located to determine when (if ever) a cause of action accrued and the statute of limitations was thus triggered.

In virtually all previous cases, the property owner has been required to await further action by the government or take further action himself before filing suit to test the constitutionality of the regulation. Even in those cases where *facial* challenges to the regulations are decided (*e.g., Keystone*), challenges to the effects of the regulation *as applied* are relegated to later litigation. In *Keystone*, for example, although this Court entertained the facial challenge, it noted that an as applied challenge

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[7] ". . . we **do not reach** here the question of whether a taking actually occurred . . . ." (App. A, p. 6, fn. 3; emphasis added.) ". . . the injury suffered by National **might or might not** rise to the level of a taking . . . ." (App. A, p. 8; emphasis added.)

was *still* not ripe — *16 years after the statute's adoption.*

Until it has been determined that a cause of action existed upon the enactment of the Raleigh ordinance, it is impossible to conclude that the statute of limitations to suc *on that cause of action* has run.

C. This Case Sets the Stage For — Indeed, Compels — a Vast Increase in the Number of Routine Zoning and Land Use Cases Which are "Ripe" for *Immediate* Litigation

By holding that a cause of action for a Fifth Amendment taking accrues immediately upon the passage of an ordinance when an appraiser is able to hypothesize that the property is immediately worth less or is less interesting to a potential purchaser (App. A, p. 8), the opinion below has opened a gate which this and all other federal courts have endeavored to keep shut.

Contrary to virtually every federal land use/takings decision since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which have refused to permit property owners to sue municipal regulators immediately after the adoption of restrictive ordinances no matter how much the owners may believe they have been injured, the opinion below holds that an appraiser could hypothesize damage and therefore damage actually occurred and therefore the statute of limitations began to run.

With respect, the kind of "instantaneous damage" analysis in the opinion below (App. A, pp. 7-8) could be done in any routine zoning case, not to mention more complex regulatory schemes. Indeed, it is commonplace for property owners whose land is rezoned to a more

restrictive designation to charge that the rezoning has diminished the value of their property. Any of them could claim, with some degree of accuracy, that the down-zoned property is less attractive to potential purchasers. (App. A, p. 8) It is as likely that they could engage appraisers to testify to those facts of "market" life as it is for the appraisers hypothesized in the opinion below.

That's a two-edged sword. Not only does it *permit* such down-zoned property owners to file suit immediately, it *requires* them to. Failure to sue immediately would result (as it did for National Advertising at bench) in dismissal of their case if they wait for later developments to determine the actual impact of the downzoning.

II.

EITHER THE VIOLATION OF CONSTITUTIONAL RIGHTS IS SUBJECT TO STATUTES OF LIMITATIONS OR IT IS NOT. THE COURT BELOW HELD IT IS BOTH — DEPENDING ON THE RIGHT WHICH WAS VIOLATED

If — as the opinion below holds — the **First** Amendment challenge was not barred by the statute of limitations, then the **Fifth** Amendment challenge wasn't either.

The opinion below has a strange dual personality:

- For most of its length, it agonizes over how the statute of limitations applies to National's **Fifth** Amendment challenge to Raleigh's billboard

ordinance. (App. A, pp. 5-16) The opinion finally concludes its lengthy analysis by holding that the **Fifth** Amendment challenge was time-barred.

- Then (App. A, p. 16), the opinion turns to the **First** Amendment issues (which the District Court held to be just as time-barred as the Fifth Amendment issues and thus did *not* decide on their merits) and held, without any of the agonizing analysis applied to the **Fifth** Amendment issues, that the **First** Amendment issues *could not* be time-barred.

Why? The reason is simplicity itself: "Because it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period . . . ." (App. A, p. 16)

National agrees with the proposition that ordinances which are offensive to the Constitution cannot be saved by statutes of limitations. That is the clear message of such cases as *Brown v. Board of Education*, 347 U.S. 483 (1954); *Virginia Hosp. Assn. v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Assn.*, 496 U.S. ___, 110 L.Ed.2d 455 (1990); *cf. Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982) [violation of statutory authorization renders ordinance void].

While in no way disparaging the importance of the First Amendment, the Fifth Amendment protection of the rights of private property owners was linked by the constitutional draftsmen with the ultimate rights to life and liberty. Surely, the rights to life, liberty and property guaranteed by the Fifth Amendment occupy no

lower rung in the pantheon than those protected by the First.

The opinion below conflicts with itself, as well as the decisions noted above, in holding that one type of Constitutional challenge is timely while another is barred. Under the opinion's **First** Amendment reasoning, the **Fifth** Amendment issues need to be remanded for trial.

III.

THERE IS CONFLICT ABOUT THE PROPER STATUTE OF LIMITATIONS TO APPLY TO A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT

The Court of Appeals' opinion disposes of this case as though the statute of limitations applied under the Civil Rights Act (42 U.S.C. §1983) governs all aspects of this litigation. But, as the complaint shows, National Advertising also sought relief for a taking of its property directly under the Fifth Amendment to the Constitution.

An opinion of the 9th Circuit Court of Appeals, rendered after the filing of the opinion below, holds that a different limitations period applies for the inverse condemnation action brought directly under the Constitution than for the §1983 action seeking compensation for a taking. The opinion at bench and the 9th Circuit opinion cannot both be correct. Either the statutes of limitations are the same or they are different. To avoid continuing confusion, this Court needs to end the dispute.

In *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), the Court held that a property

owner's §1983 action was time-barred. (948 F.2d at 586)[8] Then, turning its attention to the Constitutional Fifth Amendment cause of action, the Court concluded that a different statute of limitations had to be applied, rendering that cause of action timely. (948 F.2d at 587)

The 9th Circuit's opinion in *Azul Pacifico* holds that either the state statute of limitations for inverse condemnation or the federal statute of limitations for inverse condemnation applied by the Claims Court must be applied to the takings issue. In that case, the Court found it unnecessary to decide which of these two standards applied because under either the state inverse condemnation statute (5 years) or the federal Claims Court statute (6 years), the action was timely.

National believes that, under North Carolina law, the statute of limitations generally relied on for inverse condemnations is G.S.N.C. §1-40, the 20 year period for adverse possession. (*E.g., Holye v. Charlotte*, 172 S.E.2d 1 [1970]; *Love v. Postal Telegraph-Cable Co.*, 20 S.E.2d 337 [1942].) In reply to National's Petition for Rehearing below, Raleigh suggested that the 2-year period under G.S.N.C. §40A-51 was appropriate. Even in that event, the action was timely, as the 2 years runs from ". . . the date of the taking of the affected property *or the completion of the project involving the taking*,

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[8] The ordinance in *Azul Pacifico*, unlike the ordinance at bench, had a clear and immediate impact on the property owners. It was a rent control ordinance which was effective on passage, was held to be a physical taking of property, and immediately altered the legal relationships between landlord and tenants. That is why, in that specific context, the cause of action properly arose immediately upon enactment of the ordinance. That enactment caused an immediate physical invasion of the property, in contrast to the case at bench, where any physical impact was delayed 5 1/2 years from enactment of the ordinance.

whichever shall occur later." (Emphasis added.) Here, no matter how one analyzes it, the "completion" of this project (*i.e.*, alteration or removal of outdoor advertising structures) could not happen until at least 5 1/2 years after adoption of the ordinance, when the "amortization" period would end. Under North Carolina's statutory limitation scheme, this action was timely.

Azul Pacifico was filed after the opinion below. It was brought to the Court of Appeals' attention in National's Petition for Rehearing. Denial of rehearing was a deliberate act by the court below to create conflict of decision with the 9th Circuit. That conflict merits resolution. Both answers cannot be right.

CONCLUSION

The question of when a property owner should (or must) file suit to challenge the impact of a municipal regulation has been in a state of constant flux at least since this Court's decision more than a decade ago in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

It is appropriate at this time for this Court to provide some unified guidance to lower courts and all participants in the land use process, by explaining when it is necessary for a property owner to sue and when it is necessary for that property owner to await further developments.

The present system is chaotic. When a property owner sues soon after an ordinance is enacted, it is a knee-jerk governmental response to move to dismiss because the case is not yet "ripe." When a property owner waits until it appears that the claim has "ripened," as happened here, the government then claims that suit was too late and is time-barred. Indeed, so confused is

the law, and so ubiquitous the timeliness challenges, that it is not unusual for a property owner to find his or her action challenged as being **simultaneously** unripe (too early) and time-barred (too late).

National Advertising Company prays that this Court's writ issue so that rationality can be brought to this area of the law and the time of courts and litigants can be spent evaluating the merits of their cases rather than counting further angels on the Janus-faced pinheads of timeliness and ripeness.

Dated: March 25, 1992.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record

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Attorneys for Petitioner
NATIONAL ADVERTISING COMPANY

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NATIONAL ADVERTISING COMPANY,
Plaintiff-Appellant,

v.

CITY OF RALEIGH, North Carolina,
Defendant-Appellee.
SOUTHERN ENVIRONMENTAL LAW CENTER,
Amicus Curiae.

No. 90-3086

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge.
(CA-89-332-CIV-5-B)

Argued: January 8, 1991

Decided: October 25, 1991

Before RUSSELL and WILKINS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Ellis wrote the opinion, in which Judge Russell and Judge Wilkins joined.

COUNSEL

ARGUED: Michael M. Berger, FADEM, BERGER, NORTON, Los Angeles, California, for Appellant. Thomas A. McCormick, CITY OF

RALEIGH, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Katherine E. Slaughter, SOUTHERN ENVIRONMENTAL LAW CENTER, Charlottesville, Virginia, for Amicus Curiae.

OPINION

ELLIS, District Judge:

Appellant National Advertising Company commenced this action in April 1989 under 42 U.S.C. § 1983 alleging that a 1983 ordinance adopted by the City of Raleigh, North Carolina, restricting off-premise outdoor advertising signs, violated the First and Fourteenth Amendments and also resulted in a taking without just compensation in violation of the Fifth and Fourteenth Amendments. The district court found that National's suit was barred by North Carolina's three-year limitations period set forth in G.S.N.C. § 1-52(2). On appeal, National contends that it suffered no injury from the ordinance, and hence no cause of action accrued, until a five-and-one-half (5 1/2) year grace period provided in the ordinance for nonconforming signs expired. National also contends that its action is timely because the ordinance constitutes a "continuing" constitutional violation. The district court rejected National's contentions. Finding no error below, we affirm.

I.

On October 18, 1983, the Raleigh city council adopted Ordinance No. 210 TC 198 ("the 1983 ordinance" or "the ordinance"), which by its terms became effective October 23, 1983.[1] This ordinance amended a 1979 ordinance that established zoning regulations for signs in Raleigh. The 1979 ordinance allowed "on-premise" signs, defined as signs located on the premises which "direct[] attention to a business, profession, commodity, service, or entertainment conducted, offered, sold, manufactured, or provided at a location on the

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[1]A detailed description of this ordinance appears in this Court's opinion in *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1270-72 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

premises where the sign is located or to which it is affixed," and permitted "off-premise" signs (or "non-point-of-sale" signs) and special category signs, including political signs, real estate signs and governmental and public purpose signs, in certain areas of Raleigh.

The 1983 ordinance modified the 1979 ordinance, *inter alia*, by reducing the size of permissible off-premise signs from 672 square feet to 150 square feet for signs facing streets with four or more traffic lanes, and to 75 square feet for signs facing streets with fewer than four traffic lanes. A further modification confined the location of such signs to so-called "industrial zones" as defined in the ordinance. Existing signs larger than the specified dimensions were declared nonconforming uses. Furthermore, the 1983 ordinance prohibited the construction of any new nonconforming signs and, except for ordinary maintenance and poster panel replacements, it also barred any structural alteration, reconstruction, or other material change to existing nonconforming signs unless the signs and their entire structures were brought into conformity with the 1983 ordinance. But existing nonconforming signs were not immediately banned. Rather, they enjoyed a 5 1/2 year grace period beginning October 23, 1983. At the end of this period nonconforming signs were required to be removed, unless they fell within a state law exception for signs located adjacent to highways on the National System of Interstate and Defense Highways or on the Federal-Aid Primary Highway system. The 5 1/2 year grace period (referred to in the ordinance as an "amortization" period) was in lieu of any other form of compensation.

National, a national advertising company, owns approximately thirty-six billboards in Raleigh. Sixteen of these billboards are located on federal highway systems and hence are exempted from the 1983 ordinance. National filed its complaint on April 28, 1989, more than three years after adoption of the 1983 ordinance and approximately one-month after expiration of the 5 1/2 year amortization period. Raleigh responded with a motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., contending that the action was barred either by G.S.N.C. § 1-54.1, which establishes a nine-month limitation period for "actions contesting the validity of any zoning ordinance or amendment thereto," or by G.S.N.C. § 1-52(2), which establishes a three-year limitations period for lawsuits based on "liability created by statute, either state or federal." The district court determined that

the latter statute applied and barred National's suit. On appeal, National concedes that § 1-52(2) establishes the applicable limitations period. It contends, however, that it was not injured by the 1983 ordinance until the 5 1/2 year amortization period for nonconforming signs expired and it was forced to remove its signs or contest the validity of the ordinance. Accordingly, National argues that the district court erred in finding that the cause of action accrued upon enactment of the ordinance in October 1983. Instead, National contends the cause of action did not accrue until either the expiration of the amortization period or, at the earliest, January 6, 1989, the date it received a notification letter from Raleigh demanding the removal of its nonconforming billboards by April 1989. Alternatively, National claims that the 1983 ordinance created a continuing constitutional violation and therefore National's action is timely. We review these claims *seriatim*.

II.

Because there is no federal statute of limitations applicable to suits under § 1983, "it is the rule that the applicable 'provision limiting the time in which an action [under § 1983] must be brought, must be borrowed from the analogous state statute of limitations.'" *Bireline v. Seagondollar*, 567 F.2d 260, 262 (4th Cir. 1977), quoting *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975). The parties take the view that the analogous state limitations period is the three-year limitations period established in G.S.N.C. § 1-52(2) for actions based on "liability created by statute, either state or federal." While we agree that a three-year limitations period is applicable, we find that this limitations period is supplied by G.S.N.C. § 1-52(5), relating to personal injury actions, and not § 1-52(2).[2]

[2]In concluding that G.S.N.C. § 1-52(2) provides the applicable limitations period, the parties rely on past decisions of this Court. *See Bireline*, 567 F.2d at 263 (holding that § 1-52(2) is the most analogous limitations period for § 1983 actions); *Cox*, 529 F.2d at 49 (same). More recently, however, the Supreme Court held that the analogous state statute of limitations most appropriate for § 1983 actions is the limitation period for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985). In 1989, the Supreme Court further refined *Wilson* by holding that

The selection of the appropriate statutory limitations period is only the first step in the analysis. There remains the question of when National's cause of action accrued. While the statutory limitations period for § 1983 actions is borrowed from state law, "[t]he time of accrual of a civil rights action is a question of federal law." *Id.* at 50; *Campbell v. Haverhill*, 155 U.S. 610 (1895); *Bridgford v. United States*, 550 F.2d 978, 981 (4th Cir. 1977). "Federal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." *Cox*, 529 F.2d at 50; *see Urie v. Thompson*, 337 U.S. 163, 170 (1949) ("statutes of limitations . . . conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights"); *Blanck v. McKeen*, 707 F.2d 817, 819 (4th Cir.), *cert. denied*, 464 U.S. 916 (1983); *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 503 (4th Cir. 1961).

The basis of a takings claim is the assertion that a regulation's "interference with appellants' property is of such magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978), quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). In determining whether a taking has occurred, courts examine several factors, including "the economic impact of the regu-

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where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

Owens v. Okure, _ U.S. _, 109 S. Ct. 573, 582 (1989) (holding that New York's three-year residual statute of limitations for personal injury claims not embraced by specific statutes, rather than one-year statute of limitations for intentional torts, governed § 1983 action). Thus, as courts since *Wilson* have recognized, the three-year period for personal injury actions set forth in § 1-52(5) is the North Carolina limitations period applicable to § 1983 actions. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Reagan v. Hampton*, 700 F. Supp. 850 (M.D.N.C. 1988); *Reed v. United Transp. Union*, 633 F. Supp. 1516, 1525 (W.D.N.C. 1986); *see also Keller v. Prince George's County*, 827 F.2d 952, 955 n.2, 965 (4th Cir. 1987) (recognizing that *Wilson v. Garcia* requires all § 1983 actions to be characterized as personal injury tort actions for statute of limitations purposes).

lation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Courts conducting a takings analysis in the zoning context "have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'" *Esposito v. South Carolina Coastal Council*, _ F.2d _, No. 89-1840, slip op. at 9 (4th Cir. July 3, 1991),[3] quoting *Penn Central*, 438 U.S. at 136. Interference with the primary uses of a property is the touchstone of the analysis. In the zoning context, "diminution in property value, standing alone, [cannot] establish a 'taking'. . . . [T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central*, 438 U.S. at 131. The same principle applies in the present case. Hence, National's cause of action arose when the ordinance was enacted because it was then, if at all, that

[3]In *Esposito*, this Court concluded that a South Carolina statute effected no taking where it merely restricted the location for the rebuilding of beach cottages destroyed by natural causes or fire. Slip op. at 9-10. Although the result reached in Esposito differs somewhat from that reached here, particularly as we do not reach here the question of whether a taking actually occurred, the reasoning of the two decisions is consistent. The *Esposito* panel concluded that because appellants could continue to use their homes indefinitely and were "diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction," slip op. at 10, any current diminution in appellants' property values was not so great as to constitute a taking. There was no showing "that the regulation in question was 'so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession.'" *Esposito*, slip op. at 10, quoting *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985). The result in *Esposito* was based on the finding that none of appellants' homes had been destroyed and hence the rebuilding limitations had not yet been applied to any specific piece of property. As in *Esposito*, we look here to interference with the primary use of appellants' property as the principal consideration in the takings calculus. While *Esposito* reached the issue of whether a taking occurred, we do not. Instead, we decide here only when the injury occurred, not whether the injury was a taking. Specifically, we decide that the injury, which may or may not amount to a taking, occurred when the ordinance was enacted because its effect was then certain, not contingent, and because the injury complained of involved a significant interference with the primary use of specific property.

National suffered the regulatory interference with the primary uses of its property.

National contends that its cause of action did not accrue until the expiration of the 5 1/2 year amortization period in April 1989, when it faced the City's demand that the nonconforming signs be removed. Until then, National asserts, it suffered no actual injury because the 1983 ordinance was neither applied nor enforced against it. Given this, National contends that no "as applied" challenge to the ordinance was possible before April 1989; at best only a facial challenge to the ordinance's validity was possible prior to April 1989.[4]

National's contentions miss the mark. Immediately upon enactment, the 1983 ordinance interfered in a clear, concrete fashion with the property's primary use. Thus, on October 23, 1983, National's signs became "nonconforming outdoor advertising signs." As such, those signs became immediately subject to the restriction that "[a]ll

[4]National cites no decisions directly on point to support these contentions. Instead, it relies on general propositions to the effect (1) that "petitioners . . . face an uphill battle in making a facial [takings] attack," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *see Pennell v. City of San Jose*, _ U.S. _, 108 S. Ct. 849, 856-57 (1988); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (rejecting claim that "mere enactment of [a] zoning ordinance constitute[d] a taking"), (2) that an "as applied" takings analysis requires a statute's having been applied "to specific property, and [inquiries conducted as to] the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" of each case, *id.*; *accord Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 295; *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), and (3) that a takings claim is "premature" where administrative compensation and review mechanisms have not been exhausted. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 348-52; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185-97 (1985). National also relies on cases holding that no taking occurs where a regulation "does not interfere in any way with the present uses" of property. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978); *see MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 427 U.S. 1009 (1985).

nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years from the date of this ordinance . . . . " The ordinance therefore interfered in a concrete fashion with National's primary use of its existing signs by mandating that this use change or cease within five years.

Moreover, National suffered actual, concrete injury on October 23, 1983. On that date, the useful lives of National's nonconforming signs were shortened from 30 years[5] to 5 1/2 years. Thus, the present value of the nonconforming signs was reduced accordingly. Had National sought to sell its nonconforming Raleigh signs between October 1983 and April 1989, a buyer would have discounted the value of these signs to account for their shortened life. Hence, on the date of the ordinance's enactment, there was both substantial interference with the property's primary use so as to affect distinct investment-backed expectations and also actual concrete injury accompanying that interference. Whether that interference was of such magnitude as to constitute an actual "taking" could have been determined upon the enactment of the statute in 1983. We do not reach the issue here of whether the interference "was of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 136, quoting *Pennsylvania Coal Co. v.* Mahon, 260 U.S. at 413. We hold only that the injury suffered by National, an injury that might or might not rise to the level of a taking, occurred upon enactment of the ordinance at issue.[6]

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[5]National alleges in its complaint that its existing signs have remaining useful lives of up to 30 years.

[6]To determine whether the interference was so onerous as to constitute a taking requires a detailed analysis similar to that described in *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176-78 (4th Cir. 1988). Such analysis would include designating the appropriate unit of National's property affected by the ordinance, and a detailed factual inquiry as to (1) the economic impact of the regulation on National, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Id.* at 176. Secondary findings underlying these determinations would include "the number of billboards that are economically useless, the terms of [National's] leases for billboard locations, the land [National] owns for billboard locations and whether it has any other economic use, the cost of billboards that cannot be

National contends that its injury was not "concrete" in October 1983 because uncertainty allegedly then existed as to which of National's signs were subject to removal upon expiration of the amortization period. National alleges that as late as January 1989, City officials were unsure whether certain of National's signs located along the National System of Interstate Defense Highways and the Federal-Aid Primary Highway System were subject to removal. This claim is refuted on the face of the ordinance itself. It makes clear that signs along the federal highway systems were exempted from the 5 1/2 year amortization scheme.[7] Hence, it was clear when the ordi-

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used, the depreciation taken on these billboards and their actual life expectancy, [and] the income expected during the grace period . . . ." *Id.* at 178. Such an analysis would reveal, prior to the expiration of the amortization period, whether the amortization period permitted a reasonable recoupment of National's investment. *See, e.g., Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973) (upholding five-year amortization period for outdoor signs as reasonable prior to period's expiration), *cert. denied*, 417 U.S. 932 (1974); *see also Summey Outdoor Advertising, Inc. v. The County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439, 446 (1989) (same), *pet. for disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 58 N.C. App. 697, 294 S.E.2d 388, 391 (same with respect to five-and-one-half year period), *pet. for disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982); *compare La Mesa v. Tweed and Gambrell Mill*, 146 Cal.App.2d 762, 304 P.2d 803 (1958) (holding invalid as a taking a five-year amortization period applied to building with estimated remaining economic life of 20 years).

[7]The ordinance stated in relevant part:

> WHEREAS, North Carolina General Statutes 136-131.1 prohibits the regulatory amortization of outdoor advertising signs adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System and that the gradual attrition of these outdoor advertising signs provides suppliers and consumers of outdoor advertising an abundant reservoir of locations within the Raleigh market . . . .
>
> BE IT ORDAINED BY THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA that:
>
> . . . .
>
> All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2)

nance was approved in 1983 that of National's thirty-six Raleigh signs, the sixteen signs located on federal highway systems were exempt from the specific provision requiring removal within 5 1/2 years.[8] Equally clear was that the twenty remaining signs were not so exempted. Because the ordinance applied in clear, specific ways to National's thirty-six signs when enacted, and because any injury to National was real and could be calculated in terms of reduced present value on October 23, 1983, National's cause of action arose on that date.

National's cited authority is not to the contrary. This authority emphasizes that takings challenges normally focus on a statute's application to specific property, rather than attacking a statute or ordinance on its face. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 294-96. In this regard, the Supreme Court has explained that the very nature of takings inquiries usually necessitates an "as applied" rather than a "facial"[9] takings challenge:

> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

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years from the effective date of this ordinance ([October 23, 1983]), *unless explicitly prohibited by State Statute.*

(Emphasis added).

[8]The sixteen signs located along federal highway systems, while exempt from the removal requirement, still remained "nonconforming uses" subject to the ordinance's other restrictions, such as the prohibitions on reconstructing damaged nonconforming signs, moving existing nonconforming signs to new locations on their lots, or building more such signs along the federal highway systems. *Compare National Advertising Co. v. Bradshaw*, 48 N.C. App. 10, 268 S.E.2d 816, *appeal dismissed*, 301 N.C. 400, 273 S.E.2d 446 (1980) (holding illegal National's reconstruction of sign deemed nonconforming under state statute and located along federal highway system where sign was more than 50 percent destroyed by wind).

[9] A facial takings attack is a claim that the "mere enactment" of a statute constitutes a taking. *Hodel*, 452 U.S. at 295. An "as applied" challenge focuses on the effect of a statute's application to specific property.

Hodel, 452 U.S. at 295. Yet no such inquiry, National argues, could have been conducted until 1989 because the 1983 ordinance was not applied to any specific property until National was required to remove its signs in April 1989. Hence, it contends that an "as applied" challenge favored by *Hodel*, *Keystone* and similar cases could not have been mounted until 1989 and, at best, only a fruitless facial challenge could have been made in 1983. But the present matter is easily distinguished from cases involving premature facial challenges.[10] Here, the 1983 ordinance applied when enacted to specific property — National's thirty-six off-premise signs in the Raleigh area. The ordinance's language made clear that its 5 1/2 year amortization scheme applied to twenty of the thirty-six National signs, *i.e.*, those signs not located along federal highway systems. Thus, the "ad hoc, factual inquiries" that "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation" relevant to a takings analysis, *Hodel*, 452 U.S. at 295, could have been con-

[10]Both *Hodel* and *Keystone*, for example, involved facial attacks on expansive regulatory programs affecting mining properties *in general*, but not specifically identified properties. Moreover, because owners might win variances or exemptions from the program, a challenge of the program's application to specific property was not yet ripe. In *Hodel*, the Virginia Surface Mining and Reclamation Association brought a facial takings challenge against interim regulations promulgated by the Department of the Interior pursuant to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.* (1976 ed., Supp. III). The regulations, *inter alia*, required "steep slope" surface mine operators to return a mining site to its "approximate original contour." A mine operator could obtain a variance from this requirement, however, by showing that a site's new condition would allow a postreclamation economic or public use equal or better than what would otherwise be possible. *Hodel*, 452 U.S. at 284. The Supreme Court held that the regulations and underlying statute did not "on [their] face, prevent beneficial use of coal-bearing lands." *Id.* at 296. It noted that once the regulations were applied, operators might obtain variances, provided for in the regulations, from the contour requirement. It further observed that "the 'taking' issue suffers from a fatal deficiency: neither appellees nor the [lower] court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act." *Id.* at 294. The Supreme Court reached a similar result when reviewing another facial challenge to a statute regulating coal mining in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 493-99.

ducted in 1983. There is, therefore, no error or injustice in holding that National could have mounted an "as applied" challenge in October 1983 and therefore its cause of action arose at that time.[11]

Decisions holding takings challenges to be "premature" because of the availability of administrative compensation and review mechanisms[12] are also inapposite. The 1983 ordinance did not establish any variance or administrative review procedures through which sign owners might obtain relief. Instead, it provided for immediate compliance without exception.[13] Moreover, the ordinance provided for no compensation other than what it referred to as "amortization." It stated that "amortization of nonconforming outdoor signs, in contrast to grandfathering these nonconformities, will eliminate the excessive number and amount of outdoor advertising signs and signage." Hence, just as there are no variance or compensation procedures which National must exhaust now before bringing its suit, none existed in 1983 to prevent ripeness of its suit.

Finally, National is mistaken in relying on cases holding that no taking occurs where regulations permit the current use of property to continue unhindered. *See Penn Central Transportation Co. v. City of*

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[11]Consistent with this conclusion are those decisions involving advertisers that attacked sign ordinances on takings grounds prior to the expiration of amortization periods. In none of those decisions was the attack challenged as premature. *See, e.g., Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, *aff'd*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); *Summey Outdoor Advertising, Inc. v. The County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), *pet. for disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *pet. for disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

[12]*See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. at 351-52; *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. at 186-191; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 297.

[13]The ordinance stated: "*All* outdoor advertising signs shall be consistent with *all* definitions and shall comply with *all* standards and regulations of this code," and "*All* nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years . . . unless explicitly prohibited by State Statute." (Emphasis added.)

New York, 438 U.S. 104, 136 (1978); *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984). The regulations challenged in *Penn Central* and *MacLeod* had no impact on the current uses (a railroad station and a cattle ranch, respectively) of the properties at issue. Unlike those regulations, the 1983 ordinance had a specific and immediate impact on the current use of certain signs. It mandated that the current and perhaps sole use of twenty of National's nonconforming signs cease within 5 1/2 years, thus having a specific and immediate impact on the primary use of National's property.

In sum, when enacted the 1983 ordinance interfered in concrete ways with National's primary use of specific property — thirty-six signs. The district court therefore did not err in determining that National's takings cause of action arose in October 1983.

III.

National's second appeal ground is that its suit is timely because the 1983 ordinance created a continuing constitutional violation. This ground, too, fails because this is not a continuing violation case. As has been observed many times: "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *accord Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983). Here, any taking occurred at the time of the ordinance's enactment; what continued was the ill effect of the ordinance's enactment and the alleged taking. No continuing unlawful acts have been shown.

In general, "[t]o establish a continuing violation . . . the plaintiff must establish that the unconstitutional or illegal act was a . . . fixed and continuing practice." *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The challenged action must be repeated within the statute of limitations period. As the *Perez* court observed in the context of employment discrimination:

> If the discrimination alleged is a single act, the statute begins to run at the time of the act. If, on the other hand, the statutory violation does not occur at a single moment but in

> a series of separate acts and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed.

Id. at 733-34 (footnotes omitted).

With respect to statutory or regulatory challenges, we have previously found a continuing violation where regulations continued to be applied to persons within the statutory limitations period. *Virginia Hospital Ass'n v. Bailes*, 868 F.2d 653, 663 (4th Cir. 1989), *affirmed*, 110 S. Ct. 2510 (1989). Yet we have found no continuing violation where any harm to the plaintiff stemmed only from the initial application of a regulatory prohibition. *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d at 106. This distinction is well illustrated in the facts of the two cases. In *Virginia Hospital Ass'n v. Bailes*, we affirmed a district court opinion holding that "[t]he *continued enforcement* of an unconstitutional statute cannot be insulated by the statute of limitations." 868 F.2d at 663 (emphasis added). There, we held that plaintiff's claim that Virginia's procedures for reimbursing hospitals for the cost of treating Medicaid patients violated the Medicaid Act, 42 U.S.C.A. § 1396 *et seq.*, although brought four years after adoption of the procedures, was not barred by Virginia's applicable two-year statute of limitations. This conclusion rested on the holding that "the limitations period cannot protect an allegedly unconstitutional program." *Id.* On the other hand, in *Ocean Acres*, we determined that the "continuing wrong" exception did not apply to municipal ordinances banning the installation of septic tanks on certain properties. 707 F.2d at 105-07. In reaching this conclusion, we applied the two-part analysis outlined in *Cooper v. United States*, 442 F.2d 908, (7th Cir. 1971) for determining whether a continuing wrong exists: "The particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged, must all be considered." *Id.* at 912. Ultimately, we concluded there that plaintiff's allegations of harm focused "on the initial actions taken by defendants, not on a continuing course of conduct." *Ocean Acres*, 707 F.2d at 106. Moreover, statute of limitations policies were satisfied in *Ocean Acres* because at the time of the ban's enactment "[p]laintiff was aware of the actions taken by the county and of the impact of

those actions on its proposed [real estate] development." *Id.* at 107. Application of this two-part analysis leads to the same conclusions here.

National's claimed harm is that the 1983 ordinance restricted the use of its property without providing just compensation. The challenged municipal action, however, does not amount to a continuing wrong. The restriction on use and the economic loss of which National complains occurred upon enactment of the ordinance. No City action since then has added to National's alleged injury or otherwise constituted a taking. Seeking to avoid this conclusion, National points to a January 1989 letter from Raleigh, informing it that its nonconforming signs would have to be removed by April 1989, as a later wrongful act committed by the City within three years of National's suit. This argument misses the mark. The letter was not a new wrongful act, but merely a reminder of the restriction placed on National's signs in 1983. It caused National no additional injury, and is not itself the source of the alleged taking. The fact that National's signs ultimately were required to be removed or brought into conformity by April 1989 was one of the *effects* of their being deemed nonconforming upon enactment of the ordinance, not a separate violation. *Compare Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (plaintiff's loss of teaching position was merely "one of the *effects*" of alleged discriminatory denial of tenure; no "continuing violation" shown); *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) ("[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful"). This is not an instance of a statute's repeated enforcement against different individuals or even the same parties, but of a statute applied once to a discrete set of individuals with a foreseeable, ascertainable impact. In sum, an examination of the "nature of the wrongful conduct and harm alleged," *Ocean Acres*, 707 F.2d at 106, points persuasively to the absence of a continuing wrong.

Finally, an examination of the "particular policies of the statute of limitations in question," *Id.* at 107, supports the conclusion that no unfairness results from finding that the continuing wrong exception is inapplicable here. National was aware of the 1983 ordinance from at least the date of its enactment. National participated in rulemaking proceedings prior to adoption of the ordinance and clearly knew of its

terms in 1983; moreover, National was required by law to be cognizant of the numerous restrictions placed on its signs upon the ordinance's enactment. Upon the adoption of the ordinance, National was in a position to challenge it. "[A] 'continuing wrong' theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims." *Ocean Acres*, 707 F.2d at 107. Permitting National to challenge the 1983 ordinance's amortization scheme more than 5 1/2 years after its adoption would enable National to retain its signs well beyond expiration of the amortization period and would be unfair to the City. Hence, statute of limitations policies militate against finding a continuing violation.

IV.

National contended before the district court that the 1983 ordinance on its face violates the First Amendment because it (i) restricts speech without promoting a legitimate government interest, (ii) is overbroad, and (iii) is unconstitutionally vague. The district court specifically addressed only the first of these claims, and found that it was barred by the three-year statute of limitations because "plaintiff had reason to know of this alleged injury at the time the ordinance became effective." Because it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period, and since National's First Amendment claims raise purely legal issues which are well-settled, we review National's First Amendment claims on the merits.

National contends that the 1983 ordinance does not substantially advance a legitimate state interest and is overbroad because the effect of its size limitations will be to eliminate all outdoor off-premise advertising. Settled authority compels rejection of these claims. In *Major Media of the Southwest v. City of Raleigh*, we recognized that the Supreme Court "determined in *Metromedia [Inc. v. City of San Diego*, 453 U.S. 490, 508-11 (1981)]... that a city may justifiably prohibit all off-premise signs or billboards for aesthetic and safety reasons." 792 F.2d at 1272; *see also Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1979) (summarily upholding ordinance banning all off-premise billboard advertising); *Metromedia*, 453 U.S. at 508-11; at 540-41 (Stevens, J., dissenting in part); at 570 (Rehnquist, J., dissenting) ("the aesthetic justification alone is sufficient to sustain

a total prohibition on billboards within a community"). Because the 1983 ordinance was enacted to promote aesthetic and safety concerns,[14] National's first two First Amendment claims fail under *Metromedia*.

National's remaining First Amendment claim is that the ordinance is unconstitutionally vague because in certain limited instances it requires city officials to determine whether the contents of an advertisement are "commercial" or "non-commercial."[15] National contends that since the ordinance contains no definition of "commercial" or "non-commercial," insufficient guidance is given city officials. We rejected this precise contention in *Major Media of the Southeast v. City of Raleigh*, 792 F.2d at 1272, finding that the Supreme Court has already sufficiently defined these terms. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980) (commercial speech is "expression related solely to the economic interests of the speaker and its audience"); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (commercial speech "does 'no more than propose a commercial transaction'"), quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973); *Board of Trustees of the State University of New York v. Fox*, _ U.S. _, 109 S. Ct. 3028, 3031 (commercial speech "propose[s] a commercial transaction"). We further observed in *Metromedia* that:

> Although an occasional marginal case might arise raising

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[14]The ordinance states that its purpose is to "enhance property values, traffic safety, and [the] community appearance" of Raleigh.

[15]Raleigh's ordinance, as amended on December 4, 1984 by Ordinance 450 TC 228, states: "Any sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy." As we noted *Major Media of the Southeast v. City of Raleigh*, 792 F.2d at 1271 n.2, this amendment "seems to allow non-commercial copy to be placed on any on-premise sign (or any permitted off-premise sign) instead of commercial copy." In many instances, then, city officials are not required to determine whether an advertisement is commercial or non-commercial. However, in certain limited instances, if a sign is proposed for an area where neither on-premise nor off-premise signs are permitted, an inspector may nevertheless permit the sign if its contents are non-commercial. *Id.* at 1271. In these limited instances, an analysis of the contents of the sign is required.

> the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by the court decisions in the area.

Id. at 1272-73. We find no reason to depart from our previous holding.[16] In sum, we reject National's First Amendment claims on the merits.

Accordingly, we affirm the decision of the district court granting summary judgment to Raleigh.

AFFIRMED

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[16]We also note that even if the specific provisions of the Raleigh ordinance that require inspectors to consider the content of an advertisement were held invalid, the size limitations on off-premise advertising, which are the provisions that affect National, would remain in force. *See* Raleigh City Code § 14-1004 (discussing severability of "sections, paragraphs, sentences, clauses and phrases of this Code").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 31, 1991

No. 90-3086
CA-89-332-5-CIV-BR

NATIONAL ADVERTISING COMPANY
Plaintiff-Appellant

v.

CITY OF RALEIGH, North Carolina
Defendant-Appellee

SOUTHERN ENVIRONMENTAL LAW CENTER
Amicus Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Wilkins and Judge Ellis.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 89-332-CIV-5-BR

FILED
APR 27, 1990

NATIONAL ADVERTISING COMPANY,
a Delaware Corporation,
Plaintiff,

v.

CITY OF RALEIGH, NORTH CAROLINA,
Defendant.

ORDER

This matter is before the court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant contends that plaintiff's action is barred by the statute of limitations and that if the court should find to the contrary, "a large portion of the claim is not firmly grounded in law and has been decided by recent decisions in this circuit and district." Plaintiff has responded to defendant's motion and the defendant has replied. The court heard oral argument on the motion on 27 February 1990. The matter is now ripe for disposition.

I. FACTS

On 18 October 1983 the City of Raleigh adopted Ordinance No. 210 TC 198 entitled "An Ordinance Regulating the Placement, Area, and Height of Outdoor Advertising Signs" which became effective on 23

October 1983 ("October 1983 ordinance"). The October 1983 ordinance limits the size of off-premise outdoor advertising signs (billboards) facing four-lane streets to 150 square feet and limits the size of off-premise billboards facing streets with less than four lanes to seventy-five feet. On-premise signs were not affected by the October 1983 ordinance. On-premise signs are defined in the 1979 ordinance as modified by the October 1983 ordinance as "signs located on the premises which direct[ ] attention to a business, profession, commodity, attraction, service, or entertainment conducted, offered, sold, manufactured, existing, or provided at a location on the premises where the sign is located or to which it is affixed."

The 1983 ordinance established a five and one-half year amortization period for removal of non-conforming signs. Except for ordinary maintenance and poster panel replacements, non-conforming billboards could not be altered, re-erected or moved during the amortization period unless the entire billboard was brought into conformity with the ordinance. The October 1983 ordinance specifically states that the amortization does not apply to billboards adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System because regulation of such signs is prohibited by North Carolina statute. On 4 December 1984 the City of Raleigh enacted Ordinance No 450 TC 228 which amended the October 1983 ordinance to include a provision which states that "[a]ny sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other."

The five and one-half year amortization period ended in April 1989 and plaintiff, National Advertising Company, a company engaged in the outdoor advertising business in Raleigh, filed a complaint on 28 April 1989 challenging the constitutionality of the ordinance.

Specifically, plaintiff contends the October 1983 ordinance violates the fifth and fourteenth amendments because the forced removal of non-conforming billboards constitutes a "taking" without just compensation. Plaintiff also contends the October 1983 ordinance violates the first amendment's guarantee of free speech which applies to the states through the fourteenth amendment because the ordinance effectively eliminates outdoor advertising as a means of communication and there are no reasonable alternative means of communication.

II. DISCUSSION

Defendant contends that plaintiff's lawsuit filed on 28 April 1989 is barred by the statute of limitations. Defendant first asserts that the plaintiff's claim is barred by N.C.G.S. 1-54.1 which establishes a nine-month statute of limitations for any "action contesting the validity of any zoning ordinance or amendment thereto . . . adopted by a city under Article 160A of the General Statutes or other applicable law." N.C.G.S. 1-54.1 (1983). Plaintiff argues that the nine-month statute of limitations does not apply to this action because plaintiff's challenge to the City's ordinance is not based on a procedural challenge to the validity of the ordinance but instead is based on 42 U.S.C. § 1983 which allows federal constitutional challenges to state or local laws. The court agrees with plaintiff.

Defendant contends that if N.C.G.S. 1-54.1 does not apply, plaintiff's action is governed by N.C.G.S. 1-52(2) which establishes a three-year statute of limitations for lawsuits based on "liability created by statute, either state or federal." N.C.G.S. 1-52(2) (1983). Defendant contends that plaintiff's action is barred by this statute of limitations because it was filed more than three years

after the effective date of the October 1983 ordinance. Plaintiff agrees that N.C.G.S. 1-52(2) provides the correct statute of limitations for this action because it is brought under § 1983. However, plaintiff contends that its action was timely filed because accrual of the statute of limitations did not begin until the amortization period ended.

Because there is no federal statute of limitations applicable to § 1983 actions, the applicable time limit in which a § 1983 action may be brought must be borrowed from state law. *Bireline v. Seagondollar*, 567 F.2d 260, 262 (4th Cir. 1977). It is clearly established that the three-year statute of limitations of N.C.G.S. 1-52(2) applies to actions brought in North Carolina pursuant to § 1983. *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975); *Bireline*, 567 F.2d at 263. The three-year statute of limitations applies to § 1983 actions because N.C.G.S. 1-52(2) establishes the time limitation applicable to actions based upon "a liability created by statute."

Although state law determines the applicable statute of limitations for a § 1983 action, federal law "fixes the time of accrual." *Bireline*, 567 F.2d at 263. Under federal law, the time of accrual is "that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.*; *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 503 (4th Cir. 1961). Here, defendant contends that plaintiff's cause of action accrued on 23 October 1983, the effective date of the October 1983 ordinance.

Plaintiff argues that its cause of action did not accrue until the end of the five and one-half year amortization period when enforcement of the ordinance began. At the earliest, plaintiff contends the date of accrual was not until 6 January 1989 when it first received notification by letter from the City that thirty-six of its billboards would have to be removed in April 1989. The City

admits that the January 1989 letter was the first enforcement step taken under the ordinance. Plaintiff asserts that the cause of action did not accrue until an actual injury occurred or was about to occur and that the immediate threat of forced removal of its billboards was the injury.

Plaintiff argues alternatively that the continuing wrong doctrine applies to this case thereby rendering its complaint timely filed. The continuing wrong doctrine is an exception to the accrual date of statutes of limitations. Under that doctrine if there is an ongoing constitutional violation accrual of the statute of limitations does not begin until the constitutional violation ends. *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989). In order to determine whether the continuing wrong doctrine applies to this action, " '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered.' " *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)).

The nature of the alleged wrongful conduct is the enactment of the October 1983 ordinance which required plaintiff to conform its billboards to the terms of the ordinance or remove the non-conforming billboards within five and one-half years from the effective date of the ordinance. The City has not taken any action since the enactment of the ordinance that would change the nature of the alleged wrongful conduct. The City's enactment of an ordinance in 1989 which established civil penalties for zoning violations does not change the nature of the alleged wrongful conduct because criminal penalties for zoning violations were in existence before 1989. Plaintiff knew as early as 23 October 1983 that in order to comply with the ordinance it had to conform its

non-conforming signs within five and one-half years. " 'A continuing violation is occasioned by continual unlawful acts, not continual ill effects from on original violation.' " *Ocean Acres Ltd.*, 707 F.2d at 106 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). Here, the alleged unlawful act occurred on 18 October 1981)). Here, the alleged unlawful act occurred on 18 October 1983 when the ordinance was enacted. The plaintiff does not contend that the City committed any other wrong. Therefore, plaintiff's challenge is only to the "continual ill effects of the original violation" which does not trigger application of the continuing wrong doctrine.

The harm alleged by plaintiff is a violation of the first amendment's guarantee of free speech applicable to the states through the fourteenth amendment and of the fifth and fourteenth amendments' prohibition of the taking of private property without "just compensation." The plaintiff contends that the ordinance violates the first amendment because there is no evidence that removal or reduction of the billboards will "substantially advance" a legitimate state interest as required by *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987). However, plaintiff knew or had reason to know of this alleged injury at the time the ordinance became effective.

Plaintiff contends in its amended complaint that the ordinance violates the fifth and fourteenth amendments because the amortization does not constitute just compensation. Because plaintiff's complaint tends to challenge the method of the "taking" rather than the "taking" itself, the injury occurred at the time plaintiff knew or should have known of the method to be used. *Ocean Acres*, 707 F.2d at 106-07. Plaintiff knew of 23 October 1983, the effective date of the ordinance, that its billboards must conform to the specifications of the ordinance. Plaintiff also knew on that same date that an

amortization period was provided for in the ordinance as compensation for the taking. Therefore, plaintiff's cause of action challenging the method of compensating for non-conforming billboards accrued on 23 October 1983.

The "particular policies of the statute of limitations in question" must also be considered in determining whether a continuing wrong doctrine applies. *Id.* "General polices of such statutes are applicable." *Id.* at 107. Plaintiff was aware of the ordinance because a representative of the plaintiff was at the City Council meeting on 22 September 1983 when the City Council was in the process of drafting and enacting the ordinance. Everyone is deemed to know the law and plaintiff does not deny that it knew that the ordinance was to become effective on 23 October 1983. Defendant argues, and the court agrees, that "[t]o allow a plaintiff to wait until the end of the amortization period to challenge its provisions places an unfair burden on the public whose elected representatives passed the legislation." In addition, "a 'continuing wrong' theory should not provide a means of relieving plaintiff from its reasonable diligence in pursuing its claims." *Id.* The court finds that the continuing wrong doctrine does not apply in this case and that plaintiff's cause of action challenging the constitutionality of the October 1983 ordinance accrued when plaintiff knew or had reason to know of the alleged injuries. *Bireline*, 567 F.2d at 263.

III. CONCLUSION

Because plaintiff knew of the alleged injuries resulting from the ordinance on 23 October 1983, plaintiff's constitutional challenges to the ordinance are barred by the three-year statute of limitations contained in N.C.G.S. 1-52(2). Summary judgment for the defendant is ALLOWED, and this action is dismissed.

This 27 April 1990.

/s/ W. EARL BRITT
W. EARL BRITT
United States District Judge

nac/cor/mmr

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Jolie Skinner
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

FILED
APR 27 1990
J. Rich Leonard, Clerk
U.S. District Court
E. DIST. NO. CAR.

NATIONAL ADVERTISING COMPANY,
a Delaware Corporation,
v.
CITY OF RALEIGH, NORTH CAROLINA,

JUDGMENT IN A CIVIL CASE

Case Number: 89-332-CIV-5-BR
Raleigh Division

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment for the defendant is allowed and this action is dismissed (BRITT, J).

THIS JUDGMENT FILED AND ENTERED ON APRIL 27, 1990, AND COPIES MAILED TO:

Odes Stroupe, Jr.
Hunton & Williams
P. O. box 109
Raleigh, NC 27602

Thomas A. McCormick, Jr.
City Attorney
P. O. Box 590
Raleigh, NC 27602

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Jolie Skinner
Deputy Clerk

April 27, 1990
Date

J. Rich Leonard
Clerk

/s/ Jolie Skinner
(By) Deputy Clerk

APPENDIX D

ORDINANCE NO. (1983) - 210 TC 198

An ordinance regulating the placement, area, and height of outdoor advertising signs.

WHEREAS, the City of Raleigh on 2 January 1979 enacted a sign ordinance, Ordinance No. (1979) 982 TC 96, which: allowed industry standard six hundred and seventy two square foot size outdoor advertising signs, permitted outdoor advertising signs to locate within zoning districts and adjacent zoning districts which allow residential dwelling units, and grandfathered nonconforming outdoor advertising signs, and

WHEREAS, since the passage of Ordinance No. (1979) 982 TC 96, there has been a proliferation in the number of outdoor advertising signs throughout the zoning jurisdiction of the City of Raleigh; and

WHEREAS, there were approximately two hundred thirty two outdoor advertising signs in the Raleigh zoning jurisdiction in July, 1982; and

WHEREAS, between July 1982 and July 1983 over one hundred permits for outdoor signs were issued by the Raleigh permits office; and

WHEREAS, the number of outdoor advertising signs and the amount of outdoor advertising signage has adversely affected residential and nonresidential property values and has made it more difficult to attract new businesses and industry; and

WHEREAS, the number of advertising signs and the amount of outdoor signage has adversely affected the appearance of the community; and

WHEREAS, the City of Raleigh is empowered by N.C.G.S. 106A-381 and N.C.G.S. 160A-382 to regulate and restrict the size, location, construction, reconstruction, alteration, repair and use of signs; and

WHEREAS, enactment of the regulations hereinafter set out will reduce the number of outdoor advertising signs and the amount of outdoor signage and it will enhance property values, traffic safety, and community appearance of the capital city; and

WHEREAS, six feet by twelve feet poster panels are a national medium for outdoor advertising with approximately one hundred thousand of these poster panels available in over one hundred cities nationwide; and

WHEREAS, Carolina Poster Company has over sixty-four six feet by twelve feet poster panels in Raleigh-Durham and over four hundred of these poster panels in North and South Carolina; and

WHEREAS, the Naegele Outdoor Advertising Company uses six feet by twelve feet poster panels in Raleigh, North Carolina, Jacksonville, Florida and Minneapolis and St. Paul, Minnesota; and

WHEREAS, the Summey Sign & Outdoor Advertising Company of Black Mountain, North Carolina has approximately fifty four six by twelve feet poster panels in Asheville and Hendersonville; and the Schloss Outdoor Advertising Company has approximately twenty-five six by twelve feet poster panels in Charlotte, North Carolina; and

WHEREAS, the 3M National Advertising Company has eighty six feet by twelve feet poster panels in Charleston, South Carolina; and

WHEREAS, six feet by twelve feet poster panels are used by national advertisers such as Coca-Cola, Orkin, Texaco, United States Army, and the Salem cigarettes; and

WHEREAS, replacing the existing one thousand foot linear spacing standard with a one thousand foot radial standard will disperse the present concentration of outdoor advertising signs; and

WHEREAS, the City of Raleigh within the last five years has enacted transitional yard standards, tree planting requirements in both off-street parking areas and along thoroughfare yards, and on-premise sign regulations as part of its concerted city-wide effort to protect and enhance the aesthetic quality of the Capital City and its environs; and

WHEREAS, in October 1982 the Raleigh City Council in Work Session discussed ten city-wide community appearance projects, one of these projects discussed was the enactment of more stringent outdoor advertising sign regulations; and

WHEREAS, amortization of nonconforming outdoor advertising signs, in contrast to grandfathering these nonconformities, will eliminate the excessive number and amount of outdoor advertising signs and signage; and

WHEREAS, approximately one hundred and forty outdoor advertising signs in the Raleigh zoning jurisdiction or nearly 41.7 percent of the total number of outdoor advertising signs are located adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System; and

WHEREAS, North Carolina General Statutes 136-131.1 prohibits the regulatory amortization of outdoor advertising signs adjacent to highways on the National System of Interstate Defense Highways and the Federal-aid Primary Highway System and that the gradual attrition of these outdoor advertising signs provides suppliers and consumers of outdoor advertising an abundant reservoir of locations within the Raleigh market.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF RALEIGH, NORTH CAROLINA that:

Section 1. Section 10-2066 *et seq.* of the Raleigh City Code is hereby repealed, rewritten, and reenaced to read as follows:

Sec. 10-2066. Off-premise signage (outdoor advertising signs).

Purpose: For the purpose of regulating excess signage, encouraging the positive economic development of the City, promoting the safety of the traveling public, protecting existing property values in both residential and non-residential areas, preventing the overcrowding of land, promoting a positive community appearance as part of a concerted city-wide effort to protect and enhance the aesthetics of the Capital City for the enjoyment of all citizens of North Carolina, outdoor advertising signs are herein regulated.

The regulations are designed to prevent their overconcentration, improper placement, and excessive height, bulk, number and area. It is recognized that, unlike on-premise identification signs which are in actuality a part of a business outdoor advertising is a separate and distinct use of the public thoroughfare. With a view to this distinction, outdoor advertising signs are regulated differently from on-premise signs. It is intended that outdoor advertising signs be located away from residential areas, and that such signs be regulated to protect the character of the area wherein outdoor advertising signs are located, and to conserve property values in these areas.

Sec. 10-2066.1. Design regulations.

All outdoor advertising signs shall be consistent with all definitions and shall comply with all standards and regulations of this code. Except for ordinary maintenance, poster panel replacement, copy changes, or repair not involving structural, material, or electrical changes, no outdoor advertising signs, or part thereof, shall be erected, altered, constructed, changed, converted, re-erected, additionally illuminated, reduced in size, enlarged, or moved unless the entire outdoor advertising sign and structure are brought into conformity with this code.

(1) Area of outdoor advertising signs. No outdoor advertising sign facing streets with four or more traffic lanes may exceed one hundred and fifty square feet; outdoor advertising signs facing streets with fewer than four traffic lanes may not exceed seventy-five (75) square feet. The sign areas is measured by finding the area of the minimum imaginary rectangle or square of vertical and horizontal lines which fully enclose all extremities of the sign, excluding supports, the base or apron unless such copy, message, announcement or, decoration appears on the base or apron. The allowable sign area of signs with equal size and shape for both double-faced (back-to-back) and V-type signs is measured by computing the area of only one side of the sign. Both sides of a double-faced or V-type sign shall be of equal size. The sign area of signs with three (3) or more sides (multiple-side signs) containing copy message, decoration, or announcement visible from a street highway or expressway is measured as the sum of the area of any two (2) adjacent sides.

(2) Height. No outdoor advertising sign or part thereof, including base or apron; supports; supporting structures; and trim, may exceed thirty (30) feet in height.

(3) Setback requirements. Setback and yard requirements contained in this chapter are not applicable to outdoor advertising signs.

(4) Construction standards.

a. Compliance with building codes. All signs shall comply with the appropriate detailed provisions of the North Carolina and city building codes, the National Electric Code and other provisions of the Code of the City of Raleigh.

b. Clearance from high voltage power lines. Outdoor advertising signs shall be located in such a way that they maintain horizontal and vertical clearance of all overhead electrical conductors in accordance with the National Electric Code provided that in no case shall an outdoor advertising sign be erected closer than ten (10) feet horizontally or vertically from any conductor or public utility guy wire.

c. Corner lots. No part of an outdoor advertising sign may be located within a triangular area formed by the street right-of-way lines and a line connecting them at points fifty (50) feet form the right-of-way intersection.

d. Spacing of signs. No part of any outdoor advertising sign shall be located less than one thousand (1,000) feet from any part of another outdoor advertising sign when located within either two (2) two hundred (200) foot corridors along each side of a roadway. The two corridors shall be delineated by connecting perpendicular measurements from all points along the road rights-of-ways. No part of any permitted outdoor advertising sign which is located outside of the two hundred (200) foot corridor areas may be located within a one thousand (1,000) foot radius of any other outdoor advertising sign.

Sec. 10-2066.2. Specific outdoor advertising sign regulations.

Outdoor advertising signs and structures which comply with the provisions of this code are permitted in any industrial zoning district provided the specific sign location is four hundred (400) feet or more from any zoning district which allows any dwelling unit.

Sec. 10-2066.3. Prohibited signs.

The provisions contained in section 10-2065.5 are expressly made applicable to all outdoor advertising structures.

Sec. 10-2066.4. Nonconforming off-premise signs (amortization).

All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years from the effective date of this ordinance unless

explicitly prohibited by State Statute. All outdoor advertising signs which are made nonconforming by an amendment to this chapter, or to the official zoning map, or extension of the areas in which this ordinance is applicable shall be discontinued or made conforming (amortized) within five and one-half (5 1/2) years after the date of such amendment or extension, unless explicitly prohibited by State Statute.".

Section 2. Section 10-2044(b) of the Raleigh City code which allows outdoor advertising sign in neighborhood business zoning districts is repealed in its entirety.

Section 3. Section 10-2044(2) of the Raleigh City Code relating to neighborhood business districts is hereby repealed, rewritten, and reenacted to read as follows:

"(2) Prohibited uses. The following uses are prohibited in a neighborhood business district:

a. Any use prohibited in a shopping center district.".

Section 4. Section 10-2045(2)h of the Raleigh City Code relating to prohibited uses in the business district is hereby repealed, rewritten, and reenacted to read as follows:

"h. Billboards and outdoor advertising structures and signs.".

Section 5. Section one of ordinance no. (1983) 153 TC 190 enacted July 14, 1983 and is to be codified as Raleigh City Code section 10-2045.1(1)(b) is hereby deleted in its entirely and subsections (c) through (k) are relettered 10-2045.1(1)(b) through 10-2045.1(1)(j), respectively.

Section 6. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(1)(k) is relettered

10-2045.1(1)(j) and the references in subsection (3) therein to pre-existing outdoor storage use described in 10-2045.1(1)(i) and to pre-existing outdoor storage use of vehicles boats, mobile homes, etc. described in 10-2045.1(1)(j) are hereby changed to 10-2045.1(1)(h) and 10-2045.1(1)(i) respectively.

Section 7. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(3)(c) is hereby amended to change the reference therein from 10-2045.1(1)(k) to 10-2045.1(1)(j).

Section 8. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(3)(d)2 is hereby amended to delete the following punctuation and words therefrom ", except billboard,".

Section 9. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(4) is hereby amended to add a new subsection, (g), said new subsection is to follow 10-2045.1(4)(f) and shall read as follows:

> "(g) billboards and outdoor advertising structures and signs.".

Section 10. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(5)(a)(3) is hereby amended to change the references therein from 10-2045.1(1)(i), (j), and (k) to 10-2045.1(1)(h), (i), and (j) respectively.

Section 11. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.1(5)(a)(10) is hereby amended to change the references therein from

10-2045.1(1)(i) and (j) to 10-2045.1(1)(h) and (i) respectively.

Section 12. Section one of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2045.3 is hereby amended: to replace the semicolon in subsection 10-2045.3(a) with a period, to delete the word "and" following that period, and to repeal 10-2045.3(b) in its entirety.

Section 13. The first sentence of section two of ordinance no. (1983) 153 TC 190 enacted July 19, 1983 and is to be codified as Raleigh City Code section 10-2002 protective yard is hereby amended: to add the word "or" after the word "storage", to change the comma following the words "loading areas" to a period, and to delete the last three words from that sentence which read as follows "or off-premise signs".

Section 17. Section 10-2064(a)(5) of the Raleigh City Code relating to height, limitations in industrial zoning districts is hereby amended to add at the beginning of said section the following: "except billboards,".

Section 18. Section 10-2064(b)(5) of the Raleigh City code relating to height limitations of signs is hereby amended to change the code references therein from 10-2065.1(a) to 10-2065.1(1) and from 10-2065.1(b) to 10-2066.1(2).

Section 19. The definitions of on-premise sign and off-premise sign contained in Raleigh City code section 10-2002 are hereby amended to add after the word "commodity" the following ", attraction," and to add after the word "manufactured" the following ", existing,".

Section 20. Nothing in this ordinance or in section 10-2065 of the Raleigh City Code shall apply to non-commercial signs.

Section 21. All ordinances and clauses in conflict herewith are hereby repealed to the extent of said conflict.

Section 22. This ordinance has been adopted following a duly advertised joint public hearing of the Raleigh City Council and the City Planning Commission following a recommendation of the Planning Commission.

Section 23. If this ordinance or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given separate effect and to this end the provisions of this ordinance are declared to be severable.

Section 24. This ordinance shall be enforced as provided in N.C.G.S. 160A-175

Section 25. This ordinance shall become effective five (5) days following its adoption.

ADOPTED: 10/18/83

EFFECTIVE: 10/23/83

DISTRIBUTION: City Council
City Manager
City Attorney
Planning Director (5)
Inspections (3)

W3951